

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 00-1735

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BRUCE MIELOCH AND JUDY MIELOCH,

PLAINTIFFS-APPELLANTS,

v.

**COUNTRY MUTUAL INSURANCE COMPANY AND
SARA GERSBACH,**

DEFENDANTS-RESPONDENTS,

**GUNTER GERSBACH AND HUMANA WISCONSIN
HEALTH ORGANIZATION INSURANCE CORPORATION,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Bruce and Judy Mieloch appeal from a summary judgment dismissal of their negligence complaint against Gunter and Sara Gersbach.¹ The Mielochs contend that the trial court erred in granting the summary dismissal because material issues of fact exist with respect to their negligence claim. We affirm the summary judgment.

FACTS

¶2 The Mielochs are professional dog trainers and handlers who board, train and show dogs competitively. Sara Gersbach breeds and shows a species of larger dogs known as Akitas.² On August 12, 1996, Sara brought a fourteen-month-old, 100-pound Akita named Kodak to the Mielochs to be trained for show purposes. During Kodak's training, and while under the care and control of the Mielochs, the dog bit and held onto Judy Mieloch's arm. Bruce Mieloch and Terry Zandt were present during the biting incident and were also bitten by Kodak when they attempted to defend and assist Judy. Bruce eventually grabbed a gun and destroyed Kodak.

¶3 Approximately four months prior to the Mieloch incident, Kodak had snapped (bit in the air) at dog trainer Brian Meyer. Meyer had trained about twenty Akitas and reacted to Kodak's behavior by telling Sara Gersbach to "[t]ake [Kodak] home and work with him." Meyer further indicated that he did not

¹ We will refer to the defendants collectively, including liability insurer Country Mutual Insurance Company and health maintenance provider Humana Wisconsin Health Organization Insurance Corporation, as Gersbach.

² Akitas were described by dog trainer Brian Meyer as dogs bred in Japan for use as guard dogs. Bruce Mieloch stated that his kennel handled sporting, hound, working and herding dogs and that Akitas were large working dogs.

consider Kodak's snapping to mean that the dog had dangerous propensities or tendencies.

¶4 On January 12, 1999, the Mielochs were deposed in a separate action filed by Terry and Judy Zandt, and testified as to their prior knowledge of the Meyer incident with Kodak.³ Bruce Mieloch testified that at an Illinois dog show four months prior to the biting incident, when Kodak was ten months old, "I had him over by Brian Meyer. He took a look at him. Brian got growled at and said he didn't want to fool around with him. I said he's only a puppy. Puppies do that all the time. They bark. They do this, they do that. It ain't no big deal."

¶5 Judy Mieloch was asked and answered the following questions during her deposition testimony:

Q Did you have any conversations with Sara Gersbach about the temperament of [Kodak]?

A I know what the dog was like because I had seen him four months earlier.

....

Q Do you recall Sara Gersbach giving you any type of warnings whatsoever with regard to the nature of the dog, the temperament of the dog?

A Well, I knew that he had growled at the other handler.

....

Q Let's go back to this approximate four months prior to August 13th. Do you recall the sequence of events down at this Illinois dog show like your husband testified to?

A I saw him working the dog, yes.

Q You saw who working the dog?

A Bruce.

....

³ The deposition testimony was included in the summary judgment document package and in the appeal record as Exhibit 41 A to D.

Q Were you aware at anytime before August 13th that [Sara Gersbach] had attempted to have [Kodak] trained with Brian Meyer?

A Yes.

Q When did you become aware of that?

A When we saw her in May or June, whenever that was.

Q What was your understanding as to why it didn't work out with Brian Meyer?

A The dog had growled at him as he came out of the truck, and Brian said no, I don't want any part of the dog.

....

Q So how did you come to the knowledge that Brian Meyer wouldn't work with this dog?

A Bruce told me.

Q And he told you that back in that May/June time frame?

A Yeah.

¶6 In a deposition dated May 12, 1999, George Huffman testified that he was a dog handler and that about five years earlier he had handled an Akita for Sara Gersbach at a dog show at the Chicago International Show. Huffman testified that he had been bitten by the dog, and that he thought the Akita that bit him was the grandmother of Kodak, the dog that bit Judy Mieloch. Huffman also testified that he saw Kodak's father bite another Akita handler in the finger, but Huffman could not identify the person by name.

¶7 Linda Wolf filed an affidavit on March 23, 2000, in which she related that "[s]ubsequent to the Mieloch incident ... Sara Gersbach ... told me that prior to Judy Mieloch being bit by Kodak that Kodak had bitten his mother, Cece's, ear and showed me the bite to Cece's ear."

STANDARD OF REVIEW

¶8 Summary judgment dispositions are reviewed de novo, applying the same methodology as used in the trial court. *See Green Spring Farms v. Kersten,*

136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The methodology is set forth in WIS. STAT. § 802.08(2) (1997-98).⁴ We first examine the pleadings and affidavits to determine whether a claim is stated and a material factual dispute is presented, *Production Credit Ass'n v. Vodak*, 150 Wis. 2d 294, 301, 441 N.W.2d 338 (Ct. App. 1989), or whether conflicting inferences might be drawn from the disputed facts. *Rady v. Lutz*, 150 Wis. 2d 643, 647, 444 N.W.2d 58 (Ct. App. 1989). If not, summary judgment is appropriate. See *id.* Summary judgment methodology prohibits the trial court from weighing the evidence, assessing credibility or deciding an issue of fact. *Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment. *Id.*

¶9 The Mielochs contend that summary judgment was inappropriate because this is a negligence claim and material factual disputes exist concerning the Gersbachs' duty to warn the Mielochs about Kodak having dangerous propensities. "Negligence' consists of failing to use that degree of care which would be exercised by a reasonable person under the circumstances." *Ceplina v. S. Milwaukee Sch. Bd.*, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976). As a general rule, the existence of negligence is a question of law for the jury. *Id.* "This court has stated that summary judgment does not lend itself well to negligence questions and should be granted in actions based on negligence only in rare cases." *Id.* at 342-43. As did the trial court, we must determine whether this summary judgment disposition represents one of those "rare cases."

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise stated.

DISCUSSION

¶10 The Mielochs contend that the Gersbachs were negligent in failing in their duty to warn the Mielochs that: (1) Kodak had snapped at Brian Meyer four months prior to the incident in which the Mielochs were bitten and injured; (2) Kodak had bitten the ear of his mother, Cece; (3) Kodak's grandmother had bitten a person; and (4) Kodak's father had bitten the finger of another person.

¶11 We first address the contention that the Gersbachs were negligent in their duty to warn the Mielochs of the Meyer incident. "Where the facts which are alleged to give rise to a duty on the part of a defendant are agreed upon, the question of whether any duty existed is one of law which the trial court may decide on a motion for summary judgment." *Id.* at 341-42. We agree that Kodak's snapping or growling at Meyer is a material fact concerning the dog's prior disposition and propensity toward another dog handler that would support a common law negligence duty to warn.⁵

¶12 However, in their deposition testimony, the Mielochs concede that they were aware of Kodak's acting out against Meyer and of Meyer's reaction to Kodak prior to their accepting the care and control of Kodak from the Gersbachs. Not only were they aware of the Meyer incident with Kodak, but they were present at the Illinois dog show when the incident occurred, and Bruce Mieloch had discussed the incident with Meyer. Judy Mieloch admitted that Bruce had told her about the incident. The Gersbachs cannot have negligently failed to warn the

⁵ The Mielochs were keepers of Kodak at the time of the incident and their cause of action is based upon common law negligence. When legal owners are not exercising control over their dog, the person acting in the capacity of the dog's keeper cannot collect strict liability damages under WIS. STAT. § 174.02. See *Armstrong v. Milwaukee Mut. Ins. Co.*, 202 Wis. 2d 258, 272, 549 N.W.2d 723 (1996).

Mielochs of that which the Mielochs admit already knowing. In addition, Kodak's acting out against Meyer could reasonably be described as menacing behavior, and in at least one other jurisdiction it has been held that "menacing behavior alone does not establish vicious propensity." *Durham v. Mooney*, 507 S.E.2d 877, 878 (Ga. Ct. App. 1998).

¶13 We next address whether the summary judgment record raises a material factual dispute as to whether the Gersbachs had a duty to warn the Mielochs of the dangerous propensities displayed by other dogs in lineage with Kodak. Summary judgment may not be granted when there are *material* factual issues in dispute. The Mielochs provide no precedent or support for the proposition that the propensities of other dogs, whether related by blood or breed, create an obligation from one dog keeper to provide such information to another when effecting the transfer of control of a particular dog.

¶14 We first note that a dog's propensities towards other dogs, as in Kodak's biting of Cece's ear, would not provide prior knowledge to an owner, actual or constructive, that a dog might bite a person. Had Kodak attacked and injured another dog while in the care and control of the Mielochs, and had the Gersbachs not advised the Mielochs of a known propensity of Kodak to attack and injure other dogs, the information might have been material to an issue of negligence. The Mielochs point to no precedent or support for the conclusion that the dog-bites-dog incident was relevant to their cause of action in negligence.

¶15 Further, we understand the Mielochs to contend that the dangerousness of a dog's kin can be imputed to the dog's owners as a basis for establishing a duty to warn as to a specific dog. Again, the Mielochs point to no legal basis or Wisconsin precedent supporting that legal theory. While Wisconsin

law does not directly address this proffered theory of negligent behavior, it has been held elsewhere that “proof that the owner of the dog either knew or should have known of *the dog’s propensity to do the particular act which caused injury* to the complaining party is indispensable to recovery against the owner.” *Id.* (citation omitted; emphasis added). We conclude that the propensities of other dogs are not material to the Mielochs’ negligence action and do not preclude a summary judgment disposition.

¶16 In sum, we conclude that because the Mielochs were already aware of the Meyer incident prior to taking control of Kodak, the Gersbachs had no duty to warn them of that event. Further, we conclude that Kodak’s propensities towards other dogs are not material to Kodak’s propensities towards dog handlers, that the behavior of other dogs in linear kinship to Kodak cannot be imputed to Kodak, and that these contentions are not material to a duty to warn on the part of the Gersbachs. Accordingly, no material issues of fact preclude summary judgment disposition, and we affirm the summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

